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NO. 83-279

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER Term, 1983

PIUS XII ACADEMY, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Pursuant to Supreme Court Rule 22.5, petitioner Pius XII Academy, Inc., replies herein to the respondent Commissioner's Memorandum in Opposition to a grant of a writ of certiorari, served on petitioner's counsel on October 28, 1983.

I. THE RESPONDENT'S CONCESSIONS

From a close reading of respondent's

Memorandum in Opposition it appears that the Commissioner concedes that full organization of a school is not a pre-requisite for tax-exempt status. The implication is that he would not defer recognition of exemption upon the ground that the school is not yet fully organized.

Therefore, respondent has abused its discretion by withholding recognition of exempt status, unless, to put it bluntly, Pius XII Academy is not what it claims to be: namely, a school for the Christian education of youth.

II. IS PETITIONER A SCHOOL?

In almost every case cited by the Commissioner to the Tax Court, to The Sixth Circuit, and to this Court wherein he denied or revoked recognition of exempt status, the applicant for said recognition was not what it claimed to be. For instance, a so-called "church" was not a church; a philanthropic entity was not

really that; a cultural interest promoted no culture, and so on. Moreover, all these entities were in full operation, and so the Commissioner could clearly see what was going on.

One would think that the Commissioner has some "inside" information tending to show that petitioner is not really a school. Certainly there is nothing in the Administrative Record tending to show that petitioner is not what it claims to be. In fact, on Page 2 in its Reply Brief before the U.S. Tax Court (filed 10/30/81) the Commissioner avers that he "has at all times treated as true the facts represented in the Administrative Record." Since petitioner is not operating, and the Commissioner can not see what is going on, this is not a case where he is refusing to recognize it on the grounds that it is a sham charity.

It is good that various individuals be-

come highly knowledgeable about various subjects of practical experience. I rely on them and I don't intend to degrade and demean them before this Honorable Court. However, petitioner's counsel particularly remembers the advice of his Evidence professor at Georgetown Law Center in 1959: "Beware of the Expert! SOMETIMES THEY CANNOT SEE THE FOREST, FOR THE TREES."

This is exactly, precisely and strictly what has happened in this case. The agents of the Commissioner do not have any "inside" information about Pius XII Academy. Rather, through frequent sharpening of their expertise by day to day examination of specialized subjects with respect to various charitable endeavours, they have become "bogged down" in picayune detail.

This is not to condemn them for their conscientious, diligent and thorough efforts. They render efficient service. But there should be some disinterested,

detached and aloof authority somewhere in government who "can see the forest, for the trees" - someone who can call a spade a spade.

I assume that a certain cameraderie exists in the IRS, where one backs the other. When petitioner took exception to a ruling by the IRS, the whole thing snowballed, and all the forces of the Executive Branch swung into high gear. Eventually the Solicitor General of the United States is called in to back or support before this Highest Court a cause without merit. All this time, expense, and grief could be spared, if only some disinterested person in the IRS would look at the information presented as a whole and say: "Yes Pius XII is a traditional Catholic school for the education of youth."

In the aforesaid Reply Brief to the Tax Court, the Commissioner also said: "Respondent does not doubt petitioner's

sincerity." If this is true, where is the exemption?

Contrary to the assertions on Page 4 and 5 of the Memorandum in Opposition, petitioner has furnished "reasonably specific answers to straightforward questions about its proposed educational activities." All answers rendered specific information, to the extent of petitioner's capacity so to specify. Of necessity, a school not fully organized nor yet operating can only produce information which is proportionate to the stage of its development. A school in its infancy simply cannot supply to the Commissioner the detailed knowledge gained by a school fully organized and operating.

III. ULTIMATE QUESTION FOR THE COURT

The basic justification for this Reply Brief of petitioner is respondent's contention in its Memorandum In Opposition

that the "decision below is purely factual." Petitioner vigorously opposes this contention, in the sense that it infers that there is no legal principle involved here. When a decision by a fact-finder is against the manifest weight of the evidence, a basic and substantial legal principle is involved! SUCH IS THE CASE HERE.

Beyond that, the ultimate question for the Court is this: Are Treasury Regulations, as construed by "experts", meant to be the law of the land? Petitioner is of the opinion that they are merely a guide, a help, a measuring stick to bring about a certain uniformity in the process of decision making by the IRS. They are meant to be an aid, as in this case, to those bodies applying for exempt status. It is not necessary that every question propounded pursuant to Treasury directives and rules be answered to the satis-

faction of the Commissioner's agents. It is not a contest where the objective is to win first prize, or a test where the goal is top score. Treasury regulations are not law, regarded as an end. They are merely means formulated at a certain time and place to achieve the end. If, from all the evidence presented by an applicant for charitable exemption, the reasonable man can conclude that said applicant is, in fact, what it claims to be, its application for exemption should not be denied because it didn't make top score nor win first prize.

CONCLUSION

Since the Commissioner has apparently conceded the correctness of petitioner's point of view with respect to the questions originally presented for review, all that remains for this Honorable Court to do is to call for the Administrative

Record from the Sixth Circuit. Examine it as an aloof, detached and disinterested observer to see if petitioner is indeed a school.

Better still for everyone concerned is for the Solicitor General, with leave of Court, frankly to confess judgment that Pius XII Academy, Inc., although not fully organized nor operating, is indeed an exempt educational non-profit corporation.

Respectfully submitted,

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